TLN-244-90

**Internal Revenue Service**

# memorandum

CC:TL:Br2
SJHankin

date: FEB 27 1990

to: Regional Counsel, Mid-Atlantic Region
Attention: Janet A. Engel

from: Assistant Chief Counsel (Tax Litigation)

subject: [redacted]

This memorandum responds to the second part of your request for technical advice, dated January 8, 1990, as to the sufficiency of the notices of deficiency which are the subject of the above dockets. Our previous memorandum, dated February 2, 1990, addressed itself only to the petitioner's challenge in Docket No. [redacted] as to the validity of the deficiency notice issued to petitioner [redacted] ("[redacted]") with regard to that corporation's [redacted] calendar tax year. This memorandum will address itself to petitioner's potential challenge in Docket No. [redacted] as to the validity of the deficiency notice issued to [redacted] ("[redacted]") with respect to the periods ending [redacted] (a short tax period), [redacted], and [redacted] (a short tax period). Apparently, neither [redacted] nor [redacted] are contemplating challenging the validity of the deficiency notice issued to [redacted], as the successor by merger of [redacted] with respect to the period beginning [redacted] and ending [redacted].

## ISSUES

(1) Whether the notice of deficiency issued to [redacted] is valid with respect to the consolidated tax liability of the [redacted] group for (a) the period [redacted] to [redacted], (b) the calendar year [redacted] and (c) the period [redacted] to [redacted].

(2) Whether the notice of transferee liability issued to [redacted] is valid with respect to the consolidated tax liability of the [redacted] groups for (a) the period [redacted] to [redacted], (b) the period [redacted] to [redacted], (c) the calendar year [redacted], (d) the period [redacted] to [redacted], (e) the period [redacted] to [redacted] and (f) the calendar year [redacted].

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## CONCLUSION AND RECOMMENDATION

The notice of deficiency issued to [redacted] for the years ending [redacted], [redacted] and [redacted] is valid, because [redacted] was the common parent agent of the [redacted] group during those tax years and its agency capacity for that group with respect to those tax years has continued, unabated. The notice of transferee liability issued to [redacted] for all the tax years at issue in this proceeding is also valid.

Accordingly, we recommend that the Service oppose any motion made by the petitioners seeking the dismissal of any part of this case on the ground that the Tax Court lacks subject-matter jurisdiction for lack of a valid deficiency notice or a valid transferee notice.

## FACTS

We incorporate herein by reference the facts set forth in our previous memorandum, dated February 2, 1990. The focus of this memorandum is on the notice of deficiency issued to [redacted] ("[redacted]") and its sole subsidiary [redacted], ("[redacted]") as it relates to (1) the period [redacted] to [redacted]; (2) the calendar year [redacted] and (3) the period [redacted] to [redacted]. Such notice was addressed to [redacted].

## DISCUSSION

Petitioner contends that [redacted] is the only proper party to whom a notice of deficiency could have been issued for the above-stated periods ending [redacted], [redacted] and [redacted]. It asserts that, since no deficiency notice was sent to [redacted] with respect to those periods, the Tax Court should dismiss the action brought in [redacted] for want of subject-matter jurisdiction. That is, it contends that the deficiency notice sent to [redacted] for those three tax periods was invalid as not having been sent to the proper agent of the [redacted] consolidated return group.

Treas. Reg. § 1.1502-77(a) provides, as a general rule that the common parent shall be the sole agent (with some stated exceptions, not here relevant) duly authorized to act in its own name in all matters relating to the tax liability for a consolidated return year. Specifically, it provides that notices of deficiency are to be mailed only to the common parent and that the mailing to the common parent shall be considered a mailing to each subsidiary in the group. Moreover, Treas. Reg. § 1.1502-77(a) contemplates that the common parent's authority to act as agent for the affiliated group arises on a year-by-year basis and that such agency capacity shall apply whether or not there has been a change in subsidiaries.

Treas. Reg. § 1.1502-77(d), however, provides special agency rules where the common parent has gone out of existence or is about to dissolve. Treas. Reg. § 1.1502-77(d) provides that if the existence of the common parent is about to terminate the common parent is to notify the district director of that fact and, subject to the district director's approval, designate another member to act as agent in its place with regard to prior consolidated return years. If the common parent does not give such notice, the other members of the group may designate, subject to the approval of the district director, a member to act as the common parent agent. Treas. Reg. § 1.1502-77(d) also provides:

> or, if such district director has reason to believe that the existence of the common parent has terminated, he may, if he deems advisable, deal directly with any member in respect of its liability.

A further gloss (or exception) to these agency rules was provided by the Tax Court in the cases of Southern Pacific Co. v. Commissioner, 84 T.C. 395 (1985) and Southern Pacific Co. v. Commissioner 84 T.C. 375 (1985). Both of these cases dealt with the issue of which entity, following a reverse acquisition, under Treas. Reg. § 1.1502-75(d)(3), in which the acquired common parent was merged (by an asset transfer) into a newly formed subsidiary of the acquiring corporation, was the proper party to receive a notice of deficiency for the tax years of the continuing consolidated return group prior to the reverse acquisition.

Treas. Reg. § 1.1502-75(d)(1) provides as a general rule that an affiliated group is deemed to remain in existence as long as the common parent remains the common parent and at least one subsidiary remains affiliated with it. The regulations recognize three exceptions to that general rule, each of which provides that the affiliated group is still deemed to remain in existence even though the common parent does not remain as the common parent. One of these exceptions is the "reverse acquisition" rule of Treas. Reg. § 1.1502-75(d)(3). The reverse acquisition rule provides that an affiliated group will not terminate where the stock or assets of the common parent are acquired by another corporation in exchange for the stock of that other corporation, provided that the shareholders of the acquired common parent, after the acquisition own more than 50 percent of the value of the acquiring corporation's stock. Treas. Reg. § 1.1502-75(d)(3)(i) further provides that after the acquisition the acquiring corporation is to be treated as the common parent of the group which is deemed to survive the reverse acquisition. Another of the exceptions to the general rule is the downstream transfer rule of Treas. Reg. § 1.1502-75(d)(2)(ii). Under that rule the group is considered as remaining in existence

notwithstanding that the common parent is no longer in existence if the members of the affiliated group succeed to and become the owners of substantially all of the assets of such former common parent and there remains one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation and which was a member of the group prior to the date such former parent ceased to exist.

In the Southern Pacific Company cases, old Southern Pacific ("old SP"), the former common parent of the consolidated group, was merged into SPTC, a wholly-owned subsidiary of new Southern Pacific ("new SP") (the new common parent) in a transaction which constituted a reverse acquisition under Treas. Reg. § 1.1502-75(d)(3). The merger was effected by SPTC receiving all the assets of old SP. In that merger, old SP ceased to exist. The old SP consolidated group attempted to designate SPTC as the successor-designee agent of the group, pursuant to Treas. Reg. § 1.1502-77(d), for the taxable years occurring prior to the reverse acquisition, but the Tax Court's opinions indicate the Service refused to recognize this designation. Instead, the Service treated new SP as the common parent of the old SP group for the pre-reverse acquisition tax years. As such, the Service issued a Statutory Notice of Deficiency to new SP for tax years of the old group occurring prior to the reverse acquisition. The taxpayer SP argued that the case should be dismissed on the ground that SPTC, rather than the new SP, was the successor agent for the group and was the proper entity to receive the statutory notice of deficiency for the group with respect to the pre-reverse acquisition years. The Tax Court in the Southern Pacific cases held that as a result of the reverse acquisition new SP became the common parent agent for the group and was, therefore, the proper entity to receive the statutory notice of deficiency for the group.

Petitioner, relying principally upon the Southern Pacific decisions, contends in the instant case that [redacted] was the only proper party to receive notices of deficiency with respect to tax periods ending [redacted], [redacted] and [redacted]. This was premised on the petitioner's belief that [redacted]'s contribution of the [redacted] stock to [redacted] on [redacted], constituted a "reverse acquisition" (within the meaning of Treas. Reg. § 1.1503-75(d)(3)) in which [redacted] was the acquired corporation and the [redacted] group was the acquiring group. The Service agrees with the petitioner's treatment of such transaction as a "reverse acquisition". See, footnote 2 of our previous memorandum. As a result of this reverse acquisition, [redacted] became the new common parent of a group composed of [redacted] as the parent corporation and [redacted] and [redacted] as wholly-owned subsidiaries of [redacted]. Petitioner thus contends that by reason of the holding in Southern Pacific, [redacted] became the common parent agent to whom any deficiency

notices would have been directed, regarding years prior to the reverse acquisition, i.e., that [redacted] became the common parent with respect to those consolidated return years of the former consolidated return group which had consisted of [redacted] as the parent corporation and [redacted] as the sole, wholly-owned subsidiary of [redacted]. Petitioner then contends that as a result of the merger of [redacted] into [redacted] on [redacted], [redacted] became the common parent with respect to the pre-reverse acquisition years (years ending [redacted], [redacted] [redacted] and [redacted]) of the [redacted] group. Petitioner has asserted that the [redacted], merger transaction was a "downstream transfer," within the meaning of Treas. Reg. § 1.1502-75(d)(ii), and states that a "downstream transfer" constitutes one of the exceptions to the general rule that a consolidated return remains in existence as long as the common parent remains as the common parent and at least one subsidiary remains affiliated with it. Petitioner asserts that the rationale of Southern Pacific regarding reverse acquisitions is equally applicable to a downstream merger. As such, petitioner contends that [redacted] became the successor agent for all the consolidated return years to which [redacted] had become the agent of the group - which included not only the years for which [redacted] had been the common parent agent, but also earlier years prior to the [redacted] reverse acquisition, for which [redacted] had been the common parent.

For two different reasons, we disagree with petitioner's argument that, under the holding in Southern Pacific, [redacted] became the successor agent with respect to those three tax years of the [redacted] group here in question.

First, it is the position of this office that the special agency rule of Southern Pacific does not extend to a reverse acquisition where the common parent of the group survives the transaction. That is, unlike Old Southern Pacific, [redacted] (the common parent of the former [redacted] group during the years at issue) survived the reverse acquisition on [redacted] and also survived the downstream merger on [redacted] of [redacted] into [redacted]. Since [redacted] never went or contemplated going out of existence, there was no need to find or designate a successor agent for the [redacted] group after either the reverse acquisition or the downstream merger. As such, under Treas. Reg. § 1.1502-77(a), [redacted] should remain as the common parent agent of the [redacted] group with respect to the tax years ending [redacted], [redacted], [redacted]. See, the attached addendum for a more detailed explanation for distinguishing the instant case from Southern Pacific on this basis.

Second, it should also be asserted that the special agency rule of Southern Pacific established in connection with reverse acquisitions is only applicable to determining the successor

agent for the pre-acquisition years of the continuing group or entity. That special agency rule is not applicable for determining who is the proper agent entity for preacquisition years of the group which is being terminated as a result of the reverse acquisition. If a reverse acquisition occurs, the acquiring group (in the instant case the [redacted] group) ceases to exist as of the date of the acquisition, while the acquired group or, in this case, the acquired corporation,[1] (in the instant case [redacted]) is treated as remaining in existence. The acquired group (or acquired corporation) remains in existence, in spite of the fact that a member of the acquiring group nominally becomes the common parent of the continuing group or in this case the continuing corporate entity, i.e., [redacted]. See, Treas. Reg. § 1.1502-75(d)(3). Moreover, the Tax Court in Southern Pacific expressly recognized and relied upon the above rules in reaching its decision.

The objective of the reverse acquisition rule is to retain the identity of the group whose shareholders own more than fifty percent in value of the combined group as a result of the acquisition and thereby give effect to the substance, rather than the form, of the transaction. Although the Tax Court in Southern Pacific was only addressing itself to the question of who was the successor agent for pre-acquisition years of that affiliated group which was deemed to survive the reverse acquisition, we believe that the rationale adopted by the Tax Court in Southern Pacific also effectively precludes the new common parent from succeeding to the agency capacity of the terminated group. That is, we believe that the rationale for requiring the new common parent to succeed to the agency capacity of the common parent of the acquired group precludes treating the new common parent as succeeding to the agency capacity of the old common parent of the acquiring group. As a basis for its holding in Southern Pacific, the Tax Court indicated that it "believed that the language of §1.1502-75(d)(3)(i) -- 'with the [acquiring] corporation becoming the common parent of the group.' -- clearly contemplates that the acquiring common parent will be metamorphized into the acquired common parent for the purposes of the consolidated return provisions." 84 T.C. at 384. An implication of that language is that an acquiring corporation, that was not the former common parent of the old acquiring group is not metamorphized by the reverse acquisition into being the acquiring group's common parent. Moreover, the Tax Court went on to indicate that it considered this agency capacity problem as involving a determination of "the extent to which the new common parent steps into the shoes of the old common parent under the reverse

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[1] A reverse acquisition can occur, as in the instant case, even though before the transaction the acquired corporation was not a member of an affiliated group filing consolidated returns. Rev. Rul. 72-322, 1972-1 C.B. 287

acquisition rule." (underlining supplied) 84 T.C. at 384. Furthermore, the Tax Court in Southern Pacific made several references to the successor common agent of the group. Clearly, the group means the continuing group, and not the terminated group. Accordingly, we believe that the successor agency rule, recognized by the Tax Court in Southern Pacific, was predicated on a continuing consolidated return group.

In the instant case, [redacted] was the common parent of the [redacted] group during the years in question. After the reverse acquisition, [redacted] became the common parent of the [redacted] group. Pursuant to the reverse acquisition rules, the old [redacted] group terminated. Hence, we believe that the metamorphosis rationale for successor agent of a continuing group (or entity) would be inappropriate. Although the group terminated, the common parent of that group, i.e., [redacted], remained in existence. Since the common parent's authority to act as agent of an affiliated group arises on a year-by-year basis, [redacted] was the common parent of the [redacted] group and continued to be the common parent of that former group, pursuant to Treas. Reg. § 1.1502-77(a). That is, since the special agency rule of Southern Pacific is inapplicable to determining the common parent agent of the terminated group, the general agency rule of Treas. Reg. § 1.1502-77(a) (i.e., that the common parent for a particular consolidated tax year is thereafter the sole agent with respect to any matter that may arise in connection with the group's tax liability for that year) should apply.

Accordingly, we believe that the Service correctly sent the notice of deficiency, with respect to the tax years ending [redacted], [redacted], and [redacted], to [redacted], because [redacted] remained the proper common parent agent of the [redacted] group for those tax years.

Our view of the series of transactional steps before which [redacted] was the parent of [redacted] and after which [redacted] became the common parent of both [redacted] and [redacted] is that those steps occurred simultaneously. We recommend, however, that our further views be sought if petitioner subsequently responds to our second argument by contending that [redacted] was somehow the last common parent agent of the [redacted] group before the reverse acquisition, so that by reason of the downstream merger of [redacted] into [redacted], [redacted] became the successor common parent agent of the old [redacted] group.

Finally, the Service should argue, as a fallback position, that even if the Tax Court concludes that [redacted] was not the proper party to act as agent for the [redacted] group for the tax year in question, the Tax Court should nonetheless uphold the validity of the notice of deficiency sent to [redacted] by construing

such act as dealing directly with [redacted] as a member of [redacted] group, with respect to its liability, as contemplated by the last sentence of Treas. Reg. § 1.1502-77(a). That provision provides that notwithstanding the rule that the common parent is the exclusive agent of the group, the district director may upon notifying the common parent deal directly with any member of the group in respect of its liability. Its liability is the entire consolidated tax liability of the group for the year in question, because Treas. Reg. § 1.1502-6(a) provides that each member corporation is severally liable for the entire consolidated tax of the group.

With regard to giving notice to the common parent, it can be argued that [redacted] (assuming only for this argument that [redacted] was the proper successor common parent agent of [redacted] group) knew that the deficiency notice in question was sent to [redacted], and that such knowledge should suffice as notice that the Service was dealing directly with [redacted] as to its tax liability. If any of the officers of [redacted] are also officers of [redacted] then notice that the Service was dealing with [redacted] can be attributed to [redacted]. Discovery might be undertaken to prove that officers of [redacted] were aware of or had reason to know that the Service was dealing with [redacted] as to the tax liabilities in question.

Finally, it can be argued that even if the Tax Court concludes that the Service failed to notify [redacted], the alleged common parent, that it was dealing directly with [redacted] as to its liability, such failure should not serve to invalidate the deficiency notice sent to [redacted]. Rather, such failure should only serve to preclude the Service from asserting and/or collecting the deficiency directly from the parent (or any other subsidiaries of the group).

TRANSFEREE LIABILITY

Finally, the sufficiency of the deficiency notice issued to [redacted] with respect to the periods ending [redacted], [redacted] and [redacted] is probably not crucial, because the Service has sent petitioner [redacted] a notice of transferee liability for all the tax periods in question in this case, including the above-stated periods. The basis for transferee liability against [redacted] is that the assets of [redacted] were transferred to [redacted] as a result of the merger of [redacted] into [redacted] on [redacted] and also that [redacted] expressly agreed to assume [redacted]'s liabilities. The merger agreement as well as the applicable Wisconsin merger statute (Wis. Stat. Section 180.67), expressly provide that [redacted], the surviving corporation, will be liable for the liabilities and obligations of [redacted], the nonsurviving corporation. Such merger agreement makes [redacted] liable as a transferee at law for all the tax liabilities of [redacted]. Since [redacted] was a member of the [redacted] group (and later the [redacted] group),

it was severally liable for the entire consolidated tax liabilities of those groups to which it belonged, pursuant to Treas. Reg. § 1.1502-6(a). Accordingly, [redacted] as transferee of [redacted] is liable for [redacted]'s unpaid tax liabilities, i.e., the unpaid consolidated tax liabilities.

Petitioner contends that petitioner [redacted] did not become a transferee of [redacted] by way of the merger. Such contention is based on a notion that the applicable merger statute, Wis. Stat. § 180.65, creates a single corporation with all the rights and privileges of the constituent corporations continuing to exist in the surviving corporation. We take no issue with that assertion, but fail to see how this precludes transferee status for [redacted]. Wis. Stat. § 180.67 expressly provides that all debts, rights and property of the merged corporations "shall be taken and deemed to be transferred to and vested in a single corporation .." Wis. Stat. 180.67(4) (underlining supplied). Furthermore, the statute also provides that in a merger of one corporation into another corporation one corporation ceases to exist while the other survives. Since [redacted] went out of existence as a result of the merger, it logically follows that it must have transferred its assets (and debts) to [redacted], the surviving corporation.

Although Wis. Stat. § 180.67(5) imposes primary liability on [redacted] for the pre-merger liabilities of [redacted], the Tax Court has held in the Southern Pacific Transportation Company cases that, regardless of the fact that the surviving corporation is primarily liable under state law, it can still be held liable as a transferee at law for the pre-merger liabilities of the nonsurviving corporation (the transferor), if the surviving corporation contractually assumed the obligations of the nonsurviving corporation under the merger agreement. 84 T.C. 367, 84 T.C. 387. The merger agreement between [redacted] and [redacted] expressly provided for such an assumption of [redacted]'s obligations. Moreover, such merger agreement also expressly provided that all rights and property of the merged corporations are deemed to be transferred to the surviving corporation.

Petitioner also argues that [redacted]'s transferee liability should be limited to the value of the assets of [redacted] transferred to [redacted], and that such value should be exclusive of [redacted]'s ownership of the stock of [redacted] (and the stock of [redacted]). Immediately prior to the merger, included in [redacted]'s assets was all the stock of [redacted] (and also all the stock of [redacted]) and after the merger [redacted] owned all the stock of [redacted]. Hence, even if the transferee liability at law should be limited to the value transferred to [redacted], that value should certainly include the value of [redacted], i.e., the value of all the stock of

[redacted], because it was clearly an asset of [redacted] that was, transferred to [redacted].[2]

In any event, where transferee liability at law is founded upon an express assumption between the transferor and transferee (as it was in this case per the merger agreement) of the transferor's liabilities, the value of the assets received by the transferee (the surviving corporation) is immaterial, since the extent of transferee liability at law is simply determined by reference to the amount of tax liability of the transferor that the transferee has agreed to pay. See, Bos Lines, Inc. v. Commissioner, 354 F.2d 830 (8th Cir. 1965); Turnbull v. Commissioner, T.C.M. 1963-335, supplemental opinion, 42 T.C. 582 (1964), aff'd 373 F.2d 91 (5th Cir. 1967); Harder Services Inc. v. Commissioner 67 T.C. 585 (1967), aff'd 77-2 USTC ¶9743 (2nd Cir. 1977).

Accordingly, we conclude that the notice of transferee issued to [redacted], with respect to all the tax years at issue in this case, is completely valid.

MARLENE GROSS

By: _____
ALFRED C. BISHOP, JR.
Chief, Branch No. 2
Tax Litigation Division

Attachment:
Addendum

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[2] If the value of [redacted] including the value of the [redacted] stock, but excluding the value of the [redacted] stock, is not equal to the value of the tax liabilities at issue, please obtain our views as to how any transferee value limitation with respect to the assets of [redacted] might also consider the value of [redacted] corporation itself.

ADDENDUM

The Southern Pacific case can be distinguished from the instant case on the following basis. Based on the fact that old SP had gone out of existence, the petitioners in Southern Pacific argued that the proper agent of the group should be determined under Treas. Reg. § 1.1502-77(d). Treas. Reg. § 1.1502-77(d) provides rules for determining a designee successor agent of the group where the old common parent has gone out of existence or is contemplating dissolution. The petitioners had contended in Southern Pacific that they had properly designated SPTC (new SP's wholly-owned corporation) as the successor agent, pursuant to the designation rules of Treas. Reg. § 1.1502-77(d). In the instant case, the old common parent [redacted], never went out of existence, nor contemplated dissolution. As such, a determination of a proper designee successor agent under the rules of Treas. Reg. § 1.1502-77(d) is not even relevant.

A reading of the Southern Pacific cases reveals that the Government's argument (that the reverse acquisition rule of Treas. Reg. § 1.1502-75(d)(3) required that new SP be recognized as the successor agent for pre-acquisition tax years) was just a responsive argument to the petitioners' assertion that Treas. Reg. § 1.1502-77(d) (or its predecessor Treas. Reg. § 1.1502-16A(c)) was the controlling provision. Stated another way, at issue in the Southern Pacific cases was whether either the designation rules of Treas. Reg. § 1.1502-77(d) (and its

predecessor 1.1502-16A(c)) or the reverse acquisition rule of Treas. Reg. § 1.1502-75(d)(3) should dictate who is the proper successor agent of the group.

In the instant case, since the old common parent, [redacted], never ceased to exist or even contemplated dissolution, the designation rules of Treas. Reg. § 1.1502-77(d) (also found in its predecessor Treas. Reg. § 1.1502-16A(c)) are clearly not applicable. Instead, the issue that is presented by the instant case is whether the reverse acquisition and downstream transfer rules of Treas. Reg. §§ 1.1502-75(d)(3) and 1.1502-75(d)(2)(ii) or the general agency rules of Treas. Reg. § 1.1502-77(a) [that the entity that is the common parent for a particular tax year is thereafter the group's sole agent for such year for tax purposes] dictate which entity is the proper agent of the group for preacquisition years.

Accordingly, the instant case presents a new issue not addressed by the Tax Court in the Southern Pacific cases.

A key point of distinction between the instant case and the Southern Pacific cases is that in the Southern Pacific cases the reverse acquisition was an asset acquisition (the assets of old SP) while in the instant case [redacted]'s acquisition was a stock acquisition (the stock of [redacted]). A reading of both Southern Pacific opinions reveals that, inspite of the fact that old SP

was merged into SPTC, (a wholly-owned subsidiary of new SP) the Tax Court considered new SP, and not SPTC, to be the successor in interest to old SP. In one of the Southern Pacific cases, the Tax Court analyzed the reverse (asset) acquisition by concluding that the substance of the transaction was an asset acquisition by new Southern Pacific with a simultaneous "drop down" of the operating assets to its wholly owned subsidiary (SPTC). Moreover, the Tax Court viewed the fact that old SP was merged into SPTC and not new SP as a matter of form. Based on this analysis, the Tax Court in Southern Pacific concluded that in substance new Southern Pacific was a continuation of the former Southern Pacific. 84 T.C. 387. The Tax Court, however, only relied upon that rationale in one of the Southern Pacific cases to support its conclusion that an application of the reverse acquisition rule determines which entity should act as agent for the group for pre-reverse acquisition years. 84 T.C. 375, 386.

The Tax Court's basis for that conclusion was its recognition that Treas. Reg. § 1.1502-75(d)(3) constitutes a substance-over-form approach. That is, the approach adopted in section 1.1502-75(d)(3) is that where there is sufficient shareholder continuity from the acquired corporation to constitute control of the acquiring corporation the substance of changes in the group's corporate structure should control for

purposes of all consolidated return provisions [1] 84 T.C. 386. Accordingly, the Southern Pacific cases can be explained on the basis that, although in form old SP went out of existence through its merger into SPTC, in substance old SP was merged into new SP. Since the Court treated new SP as a continuation of old SP, new SP was entitled to succeed to old SP's agency capacity for purposes of Treas. Reg. § 1.1502-77. [2]

By contrast, in the instant case since [redacted] remained in existence, the question doesn't arise as to who was the successor to the old common parent. That is, since [redacted] acquired the stock rather than the assets of [redacted] and since [redacted] survived the reverse acquisition as well as the later downstream merger, no argument can be made in this case that either [redacted] or [redacted] was in substance the successor to [redacted].

We recognize that the Southern Pacific cases contain the following language:

> Accordingly, we hold that the reverse acquisition rule applies in determining which entity succeeds the common

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[1] See, B. Bittker & J. Eustice, Federal Income Taxation of Corporations and Shareholders, par. 1524 at 15-77 (4th ed. 1979).

[2] Such analysis derives from the substance-over-form approach of Treas. Reg. § 1.1502-75(d)(3) and is thus independent of the section 381 rules with respect to carryovers in certain corporate acquisitions.

> parent as agent for the affiliated group with respect to years both before and after the reverse acquisition.
>
> It follows from our view of the scope of the operation of the rule that section 1.1502-75(d)(3), Income Tax Regs. effectively overrides Section 1.1502-77 Income Tax Regs. with respect to a determination of the successor agent for preacquisition years following a reverse acquisition. 84 T.C. 403, 404.

The taxpayer will probably argue that this all-inclusive language means that in any reverse acquisition or downstream transfer the new common parent is always the proper agent for all tax matters, including consents, with respect to preacquisition tax years.

The rebuttal to that contention is that the factual situation presented in the instant case (a reverse acquisition where stock rather than assets are acquired and where the old parent continues to exist) was not before the Tax Court in Southern Pacific, and therefore any broad language in that case is no more than dicta to the facts of this case. Furthermore, as explained above the rationale relied upon by the Tax Court in one of the Southern Pacific cases is clearly inapplicable to the instant case.

To summarize, we believe that, in effect, the Tax Court in Southern Pacific refused to apply § 1.1502-77(d) to the facts of that case, because even though old SP did go out of existence, the Tax Court concluded that the application of the reverse acquisition rule of Treas. Reg. § 1.1502-75(d)(3) was consistent with a recognition that in substance new SP was a continuation of old SP. As such, the application of Treas. Reg. § 1.1502-75(d)(3) dictated that new SP succeeded to old SP's agency authority for preaquisition tax years following the reverse acquisition. In that manner, it can be said that section 1.1502-75(d)(3) effectively overrode section 1.1502-77(d). In the instant case, however, [redacted] did not cease to exist and therefore the application of Treas. Reg. § 1.1502-75(d)(ii) to this case should not warrant a conclusion that either [redacted] or [redacted] was in substance a continuation of [redacted].

Accordingly, we contend that the instant case is distinguishable from the Southern Pacific cases so that the agency rules of Treas. Reg. § 1.1502-77(a) should be applied to this case, regardless of the fact that the [redacted] transaction was a reverse acquisition or the fact that [redacted] transaction was a downstream transfer.

We recognize that there is language in several private letter rulings from which a taxpayer might contend that [redacted] or [redacted] rather than [redacted] is the proper agent entity of the

group for the preacquisition tax years, i.e., that the holding of the Southern Pacific cases controls this case.

Private letter ruling [redacted] was issued on [redacted] and was concerned with the application of Treas. Reg. § 1.1502-75(d)(3) (reverse acquisition rules) to the following transaction. The stock of the old common parent ("Corp D") was contributed to the capital of a newly-formed U.S. corporation ("Corp B") by a more than 80% owner, a foreign corporation. The Service ruled that the overall transaction was a reverse acquisition and the ruling specified the proper tax return periods and the resulting filing dates. The ruling then concluded with the following two sentences:

> For purposes of filing the consolidated return for the group of corporations for the taxable year ending ****, Corp. D is considered to remain the common parent for the entire taxable year. For all other purposes, commencing with **** the date of the reverse acquisition, Corp. B is the common parent of the group of corporations of which Corp. D was the common parent.

It can be argued that this sentence should be construed to mean that a new common parent in a reverse acquisition becomes the agent for the continuing group for pre-reverse acquisition

consolidated return years even where the old common parent remains in existence as a subsidiary of the new common parent.

We believe that the language "For all other purposes, commencing with *** the date of the reverse acquisition," should be construed to mean that Corp B is the common parent of the group only for tax years commencing with or after the date of the reverse acquisition. Construed in this manner, the two sentences are not inconsistent with a conclusion that Corp D is the proper agent entity with respect to tax years prior to the reverse acquisition.

Private letter rulings, [redacted] and [redacted], which were issued on [redacted], and [redacted], respectively, involved the question of whether a consolidated return group should be considered as remaining in existence. In both rulings the old common parent or its nominees formed a holding company with the intention of the holding company becoming the new common parent of the group. Subsequently, all the outstanding stock of the old common parent was exchanged for stock of the new holding company. The Service ruled that since the transaction was indistinguishable in substance from a transaction described in section 1.1502-75(d)(2)(ii) the old group would be treated as remaining in existence after the transaction with the newly formed holding company, and becoming the common parent of the affiliated group. Both of the rulings also conclude that the

holding company shall be considered the common parent of the group immediately after the transaction, "for all purposes, including sections 1.1502-75(h)(1) and 1.1502-77(a) of the regulations except where it is specifically provided in the regulations that the [old common parent] is still to be treated as the common parent." A taxpayer might argue that this language should be construed as implying that the new common parent becomes the agent for the continuing group for pre-reverse acquisition consolidated return years, inspite of the fact that the old common parent remained in existence. Here again, we believe that such language should be construed as only referring to tax periods after the transaction. Alternatively, it can be argued that Treas. Reg. § 1.1502-77(a) is that type of regulatory provision in that it specifically provides that the old common parent is still to be treated as the common parent for purposes of pre-acquisition tax years. In other words, it provides a regulatory exception to the general rule that the new common parent is to be treated as the common parent "for all purposes."

In any event, private letter rulings have no precedential value, because section 6110(j)(3) provides that private letter rulings cannot be used or cited as precedent.